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COURT OF CRIMINAL APPEALS
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No. PD-0712-18

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

MAURICE LAMAR PIPER, Appellant/Petitioner

v.

THE STATE OF TEXAS, Appellee/Respondent

On discretionary review of a decision by the Court of Appeals, Fifth District at Dallas, Texas in Cause No. 05-16-01321-CR

On appeal from the 283rd Judicial District Court of Dallas County, Texas in Trial Court Cause No. F15-75812-T

STATE'S RESPONSE BRIEF

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas submits this brief in response to the brief of Appellant, Maurice Lamar Piper.

STATEMENT OF THE CASE

The grand jury indicted Appellant for the murder of Hardy Wilson. (CR: 12). Appellant pled not guilty. (RR4: 11; CR: 48). A jury found him guilty of the lesser-included offense of manslaughter and sentenced him to eighteen years and six months' confinement in the Institutional Division of the Texas Department of Criminal Justice. (RR6: 104; CR: 48). Appellant filed a timely motion for new trial, which was overruled by operation of law, and a timely notice of appeal. (CR: 82-83).

On appeal, the Fifth District Court of Appeals at Dallas affirmed Appellant's conviction. *Piper v. State,* No. 05-16-01321-CR, 2018 WL 3014578 (Tex. App.—Dallas June 15, 2018, pet. granted) (mem. op., not designated for publication). This Court granted Appellant's petition for discretionary review on December 5, 2018.

STATEMENT OF FACTS

At a pre-trial hearing, trial counsel informed the trial court he believed the lesser-included offenses of manslaughter and criminally-negligent homicide would be raised by the evidence at trial and he would be filing a notice of

eligibility for probation. (RR2: 11). During voir dire, both the State and trial counsel discussed manslaughter with the jury panel. (RR3: 34). Trial counsel also discussed criminally-negligent homicide and self-defense. (RR3: 89-105).

At trial, Appellant testified that he brought a loaded gun to the crime scene. (RR5: 69, 70, 91, 93, 104). He admitted that he pointed the gun at Wilson when Wilson walked toward him; however, Appellant claimed he did not intentionally shoot him. (RR5: 81-82, 87). Instead, he only shot Wilson because his brother, Dominique Hawkins, pulled on his neck and shoulder, which caused the gun to fire. (RR5: 55, 81-85). Appellant fled the crime scene and Hawkins helped him get rid of the gun. (RR5: 94). He turned himself in to police six days later and after Hawkins turned himself in. (RR5: 100). Hawkins did not testify at trial. (RR5: 23).

Three eyewitnesses for the State testified that Appellant intentionally shot Wilson and, at the time he fired the gun, Hawkins was a distance of around thirty feet away from Appellant, and Wilson had his hands raised in the air and was backing away from Appellant. (RR4: 68-71, 189-90, 218-19). Another eyewitness, who refused to testify at trial and was deemed a hostile witness, told police in a recorded statement that Appellant shot Wilson after Wilson threw up his hands, and that Hawkins was trying to stop everything and tried to pull Appellant back. (RR5: 37-38, 41-42; SX 31).

Trial counsel requested the trial court to include an instruction on criminally-negligent homicide in the jury charge, but the trial court denied his request. (RR5: 108). The record does not reflect trial counsel requested the trial court to include a voluntariness-of-conduct instruction in the jury charge.

During his closing argument, trial counsel argued the State's witnesses were not credible. (RR5: 118-20). He also extensively argued that Appellant's testimony that he shot Wilson because Hawkins pulled his neck and shoulder was truthful. (RR5: 118-24). In particular, trial counsel argued:

> But what did you hear from [Appellant] is, he had no intention of using that weapon, none. He wanted to meet [Wilson] over there. You heard from many witnesses that [Wilson] advanced at that time. And you heard – you heard testimony that at that time [Hawkins] grabbed [Appellant] and the gun went off.
>
> …
>
> And he told you that he is – feels horrible that it happened, and that is not a lie. But from all the evidence you know, he is not criminally responsible for this.
>
> And if he did anything his act was reckless, pulling out the weapon itself. He is not responsible for that weapon pulling out, but if you're going to hold him [sic] for doing anything, it was a reckless act.

(RR5: 124-25). Trial counsel argued, "Folks, this was a horrible thing and [Appellant] is not coming to you with totally clean hands. He made that admission. But at the end of the day, he is not criminally liable for the offense of murder." (RR5: 125).

SUMMARY OF ARGUMENT

The Fifth Court of Appeals' determination Appellant failed to prove by a preponderance of the evidence that trial counsel's performance was deficient under the first prong of *Strickland* does not conflict with the decisions of this Court or other Texas appellate courts.

ARGUMENT

RESPONSE TO APPELLANT'S GROUND FOR REVIEW

The Fifth Court of Appeals' determination that Appellant did not prove his trial counsel's performance was deficient under the first prong *of Strickland* does not conflict with prior decisions of this Court or other Texas appellate courts. Counsel's actions may be attributed to reasonable trial strategy, and the record does not establish deficient performance as a matter of law.

In his petition for discretionary review, Appellant contends that the Fifth Court of Appeals wrongly decided that he failed to prove the first prong of *Strickland* in his ineffective assistance of counsel claim. His ground for review has no merit.

Applicable Law

Ineffective Assistance of Counsel

Under the two-prong test for ineffective assistance of counsel, an appellant must prove that (1) his trial counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists

that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 687-88 (1984); *Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). Under the first prong, an appellant must prove that counsel's performance was deficient. *See Strickland*, 466 U.S. at 687. This requires the appellant to demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *See id.* at 688.

The reviewing court begins with a strong presumption that counsel was effective. *See Jackson v. State,* 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). The court should presume counsel's actions and decisions were reasonably professional and were motivated by sound trial strategy. *Okonkwo v. State*, 398 S.W.3d 689, 693 (Tex. Crim. App. 2013); *Jackson,* 877 S.W.2d at 771. The appellant must rebut this presumption by presenting evidence illustrating the reasons for counsel's actions and decisions. *See Jackson*, 877 S.W.2d at 771. The appellant cannot meet this burden if the record does not affirmatively support the claim. *See Menefield v. State,* 363 S.W.3d 591, 592 (Tex. Crim. App. 2012). When direct evidence is not available, reviewing courts will assume that counsel had a strategy if any reasonably sound strategic motivation can be imagined. *Lopez,* 343 S.W.3d at 143.

An ineffective assistance claim cannot be built upon retrospective speculation. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, before being condemned as unprofessional and incompetent, counsel should be given an opportunity to explain his actions. *See id.* at 836. If trial counsel is not given that opportunity, then the appellate court should not find deficient performance unless the challenged conduct was so outrageous that no competent attorney would have engaged in it. *Garcia v. State,* 57 S.W.3d 436, 440 (Tex. Crim. App. 2001). More specifically, it must be apparent from the record "that counsel's performance fell below an objective standard of reasonableness as a matter of law, and that no reasonable trial strategy could justify trial counsel's acts or omissions, regardless of his or her subjective reasoning." *Lopez*, 343 S.W.3d at 143. Thus, absent a properly developed record, an ineffective assistance claim must usually be denied as speculative. *See Bone,* 77 S.W.3d at 836. When no reasonable trial strategy could justify counsel's conduct, counsel's performance falls below an objective standard of reasonableness as a matter of law, regardless of counsel's subjective reasons for his conduct. *Okonkwo*, 398 S.W.3d at 693. Therefore, a reviewing court focuses on the objective reasonableness of counsel's actual conduct in light of the entire record. *Id.* The appellant has the burden to prove, by a

preponderance of the evidence, that there is, in fact, no plausible professional reason for a specific act or omission. *Bone,* 77 S.W.3d at 836.

Voluntariness of Conduct

If the issue of voluntariness of conduct is raised by the evidence, whether it is strong, feeble, unimpeached, or contradicted, the defendant is entitled to an instruction on that issue. *See Brown v. State,* 955 S.W.2d 276, 279–80 (Tex. Crim. App. 1997). Evidence does not raise voluntariness of conduct when the accused voluntarily engages in conduct that includes one or more voluntary acts that led to the actual shooting. *George v. State*, 681 S.W.2d 43, 47 (Tex. Crim. App. 1984). However, when evidence of an independent event that could have precipitated the discharge of the bullet, such as the conduct of a third party, is presented, a trial court must give the instruction when requested. *See id.; see also Brown,* 955 S.W.2d at 277 (holding defendant entitled to voluntariness instruction where the testimony reflected the gun discharged when the defendant was bumped from behind).

Application of Law to Facts

Brown did not address ineffective assistance of counsel; instead, the issue was whether the trial court erred in refusing to include a voluntariness instruction in the jury charge when presented with some similar facts: the defendant, charged with murder, testified that he raised a gun and it discharged

because a third party bumped him. 955 S.W.2d at 277. The individual who bumped the defendant corroborated his testimony and also testified that idiosyncrasies with the gun also may have caused it to discharge. *Id.* at 280.

This Court determined that, under the facts of that case, the defendant was entitled to his requested voluntariness instruction. *Id*. In a dissenting opinion, however, Judge Price disagreed, opining:

> In the present case, proof of the elements of the offense also establish the necessary voluntary conduct. Proof of the culpable mental state for the offense of murder, intentionally or knowingly, and the fact that the defendant voluntarily aimed a loaded gun at another human being, insured that the jury found appellant's conduct to be sufficiently voluntary. Therefore, no separate instruction on voluntariness is necessary.

Id. (Price, J., dissenting). Three judges from this Honorable Court joined in Judge Price's opinion that voluntariness of conduct is an implied element of every offense and is not a defense to a crime, but instead may be a warranted instruction in the abstract and application portions of the jury charge if the issue of voluntariness is raised by the evidence. *Id.*

Although the State is aware of caselaw that supports a conclusion that Appellant may have been entitled to a defense instruction on voluntariness, the State urges this Court to consider the dissent in *Brown* and conclude, under the facts of this particular case, Appellant was at most entitled to a voluntariness instruction in the abstract and application portions of the charge, but not a

defensive issue calling for acquittal on a finding of lack of voluntariness. *See id.* Appellant was not free of guilt for any crime at all. According to Appellant's own testimony, which was not corroborated by any other witness and indeed was highly controverted, he engaged in voluntary conduct—taking a loaded revolver to the body shop, engaging in an argument with the men there, and pointing the loaded gun at an unarmed Wilson—up until the moment his finger pulled the trigger.

In any event, even assuming Appellant was entitled to a defensive instruction on voluntariness, the record does not prove trial counsel's performance was deficient. Appellant contends trial counsel's closing argument reflects he indeed mounted a voluntariness-of-conduct defense but ignorance or mistake of the law caused him to fail to request a corresponding voluntariness-of-conduct instruction in the jury charge and to "invite" the trial court to include an "unsupported" instruction on manslaughter. Could counsel have been ignorant or mistaken about the law and conflated Appellant's account of Hawkins grabbing him and causing the gun to fire with a situation where a person points a gun at another and "accidentally" fires (e.g., his finger slipping off the trigger), without third-party intervention? *Compare George*, 681 S.W.2d at 47, *with Brown,* 955 S.W.2d at 279-80. Of course that extremely remote possibility exists, but, as discussed below, another more likely

explanation for trial counsel's conduct can be imagined that supports a finding trial counsel's conduct was reasonable.[1]

The State agrees trial counsel indeed argued during his closing that Appellant's testimony was credible. However, contrary to Appellant's contention that trial counsel's defensive strategy was voluntariness-of-conduct, his actual defense, as he clearly stated, was that Appellant, if guilty of anything at all, was merely reckless in pulling the gun out at the scene and thus, was guilty only of manslaughter.

Trial counsel, presumably knowing what the State's evidence was and what Appellant's trial testimony would be from the start, conducted voir dire on criminally-negligent homicide, which the trial court refused to include in the charge, and manslaughter. At trial, the State presented overwhelming evidence of Appellant's guilt of intentional murder through four eyewitnesses who described how Appellant intentionally shot Wilson with no interference from Hawkins. The evidence directly and strongly controverted Appellant's testimony. Appellant's actions in taking a loaded gun to the crime scene, fleeing, and turning himself in after six days also indicated his guilt. *See Bigby v.*

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[1] The State notes that trial counsel was the Honorable Douglas Schopmeyer. (RR1: 1). According to the State Bar of Texas website, Mr. Schopmeyer has been licensed to practice law in the State of Texas since 1991. *See* https://texasbar.com/AM/Template.cfm?Section=Find_A_Lawyer&template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=186005.

State, 892 S.W.2d 864, 884 (Tex. Crim. App. 1994) (stating that evidence of flight "shows a consciousness of guilt of the crime for which the defendant is on trial"); *Carter v. State*, 717 S.W.3d 60, 67 (Tex. Crim. App. 1986) (evidence that the defendant arrived at the scene of the crime carrying a loaded weapon is probative of deliberate conduct).

The record is silent as to counsel's subjective personal opinion of the weight of Appellant's testimony in light of the controverting testimony of the State's witnesses. Counsel had to work within the parameters of the testimony Appellant provided. The Court of Appeals was not present at trial to evaluate the credibility of the witnesses, but trial counsel was. As a matter of course, a vigilant defense counsel would argue to the jury that his testifying client was credible, and trial counsel vigorously did so in this case, utilizing the statements his client provided. Indeed, judicial review of trial counsel's closing arguments is highly deferential, as "deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage." *Yarborough v. Gentry*, 540 U.S. 1, 6 (2003).

That trial counsel relied on Appellant's testimony in his closing argument for recklessness that also included "facts" that may have supported a voluntariness defense was not "so outrageous that no competent attorney

would have engaged in it." *See Garcia*, 57 S.W.3d at 440; *Dannhaus v. State*, 928 S.W.2d 81, 85-86 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd) (holding that counsel's strategy to focus on culpable mental state rather than self-defense, mistake of fact, or voluntariness was not objectively unreasonable in light of the strong evidence of the appellant's guilt).

On this record, a reasonable explanation for trial counsel's strategy was that he planned from the beginning to seek an acquittal or a conviction for the lesser offenses of criminally-negligent homicide or manslaughter and therefore attempted to cast reasonable doubt on the *mens rea* for murder. This was sound trial strategy. *See Hathorn v. State*, 848 S.W.3d 101, 118 (Tex. Crim. App. 1992) (holding trial counsel's attempt to get the jury to find the appellant guilty of a lesser offense can be explained as sound trial tactic). That he argued for the truthfulness of Appellant's testimony and used the "fact" presented in his testimony that Hawkins precipitated the gun firing does not necessarily transform his manslaughter defense into a voluntariness defense.

There is at least a possibility that trial counsel's action in using the testimony Appellant provided to argue for acquittal or manslaughter could have been grounded in legitimate trial strategy. *See Lopez,* 343 S.W.3d at 143. In light of the entire record, counsel's conduct was objectively reasonable. *Okonkwo*, 398 S.W.3d at 693. The Court of Appeals correctly did not speculate

and decide that counsel was mistaken or ignorant about the law in the face of the silent record, and when reasonable trial strategy was a possibility. *See Bone*, 77 S.W.3d at 836.

The record also does not contain any direct evidence proving trial counsel was mistaken or ignorant of the law. *See, e.g., Vasquez v. State*, 830 S.W.2d 948, 951 n.4 (Tex. Crim. App. 1992) (en banc) (noting that the record reflected trial counsel had not fully researched the law regarding the offense of possession of a firearm by a felon "as evidenced by his total lack of awareness about which defenses, if any, were available to his client," and that trial counsel advised the trial court that his presentation of a defense came from the appellant's research). Moreover, this is not a case where the absence a voluntariness-of-conduct instruction caused Appellant's conviction to be "a foregone conclusion" and was deficient performance as a matter of law. *See, e.g., Vasquez,* 830 S.W.2d at 951 (holding trial counsel ineffective as a matter of law where the appellant was charged with possession of a firearm by a felon, the appellant-felon testified that he possessed a gun during his escape from kidnappers in prison, the evidence raised the defense of necessity, trial counsel did not request such an instruction, and hence the appellant's conviction was "a foregone conclusion"). Indeed, the jury did not convict Appellant of murder, but only of manslaughter. Finally, trial counsel's reliance on

Appellant's testimony to argue recklessness in pulling out a gun did not create a misstatement of the law that resulted in error as a matter of law. *See, e.g., Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) (holding that trial counsel's failure to object to the prosecutor's misstatement of the law regarding whether the defendant's sentences could be stacked could not be attributed to any reasonable trial strategy and was error as a matter of law).

Contrary to Appellant's contention, this is not a rare case where the record on direct appeal supports a finding of deficient performance under the first prong of *Strickland*. The Fifth Court of Appeals correctly applied Texas caselaw in deciding this case, its decision does not conflict with the decisions of this Court, and this Court should overrule Appellant's ground for review.

PRAYER

The State prays that this Honorable Court will affirm the judgment of the Fifth Court of Appeals and affirm Appellant's conviction.

Respectfully submitted,

/s/ Marisa Elmore

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CERTIFICATE OF WORD-COUNT COMPLIANCE

I hereby certify that the foregoing brief, including all contents except for the sections of the brief permitted to be excluded by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure, is 2,899 words in length according to Microsoft Word 2016, which was used to prepare the brief, and complies with the word-count limit in the Texas Rules of Appellate Procedure. *See* Tex. R. App. P. 9.4(i).

/s/ Marisa Elmore
Marisa Elmore

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing brief on Bruce Anton, counsel for Appellant, by electronic communication through eFileTexas.gov to ba@udashenanton.com, on January 17, 2019.

/s/ Marisa Elmore
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